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742-051—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 248

JAMES E. LITTLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. VIII, 1–15; Pet. App. 15–28) is reported at 331 F. 2d 287.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1964 (Vol. VIII, 16; Pet. App. 14–15). A petition for rehearing was denied on June 3, 1964 (Vol. VIII, 30; Pet. App. 29). The petition for a

[1] The record consists of eight volumes. Volumes II through VII, which are consecutively paginated, constitute the reporter's transcript of the trial, to which reference is made as "Tr." Volumes I and VIII, which are separately paginated, contain proceedings in the district court and the court of appeals, respectively, and are referred to by volume number.

writ of certiorari was filed on July 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), the jurisdictional requirement that the mails or interstate facilities be used in connection with the scheme to defraud in the offer and sale of securities is satisfied by proof that the defendant's bank forwarded checks of duped investors to banks in another State for collection.

STATUTE INVOLVED

Section 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 68 Stat. 686, 15 U.S.C. 77q(a), provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud;
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.
>
> * * * *

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Missouri, petitioner was convicted on eight counts of an indictment which charged him with the fraudulent sale of fractional interests in oil leases through use of the mails and interstate transportation or communication facilities, violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) (Tr. 1076–1077; Vol. I, 1–14, 39). He was sentenced to concurrent terms of imprisonment of four years on each of the counts (Tr. 1121; Pet. App. 13–14). The court of appeals unanimously affirmed (Vol. VIII, 1–15; Pet. App. 15–28). 331 F. 2d 287.

1. The evidence showed that during 1958 and 1959 petitioner was employed as an oil lease salesman for the Associated Drilling Corporation, and that he worked primarily in the St. Louis, Missouri, area (Tr. 22, 24, 56). Associated owned a number of oil leases in Green County, Kentucky, one of which was the Blackburn lease consisting of some 65 acres of land (Tr. 25–27).

In February 1959, the Star Oil Company was incorporated at petitioner's behest, and he became president (Tr. 512, 813–814, 819–820). Shortly thereafter, Associated assigned 25 acres of its Blackburn lease to the petitioner for $25,000 (Tr. 28, 39–40, 42). Petitioner subdivided the 25 acres into two tracts known as Blackburn "A" and Blackburn "B." During this period, Associated drilled two oil wells on Blackburn "A," the cost of which was included in the $25,000 (Tr. 42–43). The wells did not strike oil in any commercial quantity

and pumped only salt water (Tr. 42–43; see Tr. 127, 132–133, 233). No wells were drilled on Blackburn "B" (Tr. 42–43).

In February and March 1959, petitioner sold fractional interests in oil leases of Blackburn "A" to investors in the St. Louis area. In March and April 1959, petitioner sold similar interests in Blackburn "B" to the same investors as well as to some new investors in the St. Louis area. He told the "B" investors that Blackburn "A" was producing oil, and, to most of these people, he said that the quantity was about 100 barrels per day (Tr. 228, 232–233, 270–271, 296, 326, 338, 352, 357, 402, 433–435, 490, 560–563). Petitioner told one investor that Blackburn "A" had a "good well" which was worth at least $10,000 (Tr. 358). He told another investor that Blackburn "A" had "come in," and that it was producing "in excess of 200 barrels a day" (Tr. 402).[2] The sales were transacted face-to-face, with petitioner in most instances receiving the checks personally at the conclusion of the sales. On petitioner's instructions, the checks were made payable to the Star Oil Company, which petitioner told several investors was either "connected" or "one and the same" with the Associated Drilling Corporation (Tr. 273–274, 293, 356, 437). The leases were drawn up in the name of Associated, with petitioner signing them as vice-president of Associated (Tr. 98–99, 354–355).[3] The investors received no return on their investments,

[2] From figures supplied by the petitioner, one investor of Blackburn "B" was led to believe that his oil royalties would be between $160 and $190 per month (Tr. 326).

[3] Petitioner was not a vice-president of Associated and had no authority to use Associated's name in selling his leasehold

and lost their capital (Tr. 274, 340, 360, 403, 439, 492, 564).

Petitioner opened a checking account for the Star Oil Company at the National Bank of Commerce in Memphis, Tennessee (Tr. 510–511). He deposited in Star's account the various checks he received (ranging between $1,200 and $3,200 per investment sold) from the St. Louis investors (Tr. 514–518). These checks were credited to Star's account and handled for collection (Tr. 525–526). Although the deposit slips provided for conditional credit until the bank had collected the items deposited, the petitioner was allowed to write checks against those deposits prior to collection (Tr. 532, 534, 535; see Tr. 525–526). A vice president of the bank testified that the petitioner "was allowed to do that, but, in turn, it was not with the bank's knowledge. The only way we would have knowledge of it is if it had shown an overdraft and the overdraft had come to our attention. If we had had enough of them come in, then we would have put [petitioner] on strict collection items" (Tr. 534; see Tr. 535).

The checks which were drawn on banks in St. Louis were taken by messenger to the Federal Reserve Bank in Memphis (Tr. 518, 525). From there, the checks were sent by air express to the Federal Reserve Bank in St. Louis for eventual clearing and collection (Tr.

interests in Blackburn (Tr. 24, 98–99, 167). Star was not a branch or connected in any way with Associated; and there had been no talk among Associated officials of any merger or combination with Star (Tr. 44, 102–103, 168).

540–541, 550, 553–555). The checks which were drawn on banks in suburban St. Louis or in St. Louis County were either mailed or sent by air express from petitioner's bank in Memphis to the Mercantile Trust Company in St. Louis, a correspondent bank, for clearing and collection (Tr. 518, 523–525, 537–538, 556, 558).

2. In its instructions to the jury, the court read the pertinent provisions of 15 U.S.C. 77q(a) and either read or paraphrased the various counts of the indictment (Tr. 1035–1046). After explaining the positions of the government and the defendant (Tr. 1050–1051), the court said, in part (Tr. 1055–1056):

> There is one thing that is common to these counts, and it is a contested fact in this case, and that is whether or not the proof shows that the defendant used or caused to be used the Railway Express Agency from Memphis, Tennessee, to the Federal Reserve Bank of St. Louis, Missouri, with respect to Counts 1, 2, 4 and 5, and whether the defendant used or caused to be placed documents in the United States mail with respect to Counts 6, 7, 8 and 9. * * * [I]t is necessary for the testimony to convince you that the defendant could foresee that his actions would cause documents to be placed with the Railway Express Agency with respect to Counts 1, 2, 4 and 5, and documents to be placed in the mails with respect to Counts 6, 7, 8 and 9, and that they were so placed in the offer and sale of a fractional undivided working interest in the so-called Blackburn B lease.

Later, the court charged (Tr. 1066):

> In order to convict the defendant under any of the counts in which he is charged you must find beyond a reasonable doubt all of the following propositions: (1) That a scheme was devised as charged in the indictment and as submitted to you in these instructions; (2) that the defendant under consideration either devised the scheme or knowingly and intentionally participated in the execution thereof; (3) that the Railway Express Agency was used as a natural and probabl[e] consequence in the execution of the scheme as specified in Counts 1, 2, 4 and 5, and that the mails were used as a natural and probable consequence in the execution of the scheme as specified in Counts 6, 7, 8 and 9; and (4) that the defendant acted with knowledge of the illegal nature of the scheme as charged in the indictment and as submitted to you in these instructions.

ARGUMENT

Relying primarily upon this Court's decision in *Kann* v. *United States*, 323 U.S. 88, a mail fraud prosecution, petitioner contends (Pet. 7–12) that his bank's use of the mail and interstate air express in transmitting the checks of the duped investors from Tennessee to the Missouri banks for payment was insufficient to establish the requisite federal jurisdiction under Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), *supra*. As we show *infra*, his contention would not be valid even in mail fraud prosecution. It is clearly without merit in a prosecution under Section 77q(a) of the Securities

Act where the gist of the offense is fraud in the sale of securities, and the use of the mails or interstate facilities is merely the factor which supports federal jurisdiction. *E.g., United States* v. *Cashin,* 281 F. 2d 669, 673 (C.A. 2). The court below was correct in holding (Pet. App. 21) that "the use of the mails need not be central to the scheme to defraud," it being "sufficient if the use of the mails is merely incidental to the fraudulent conduct which the Congress intended to reach and punish by the provisions of the Securities Act of 1933." The difference between this statute and mail fraud is similar to that which this Court recognized in *United States* v. *Sheridan,* 329 U.S. 379, when it held, after *Kann,* that causing the mailing of a check violated the statute punishing the transportation of fraudulent securities (now 18 U.S.C. 2314) even though the defendant had received the full proceeds of the check before the mailing occurred.

In the instant case, there can be no question that the petitioner instituted a scheme to defraud in the sale of securities. The use of the mails and interstate air express by petitioner's Tennessee bank in transmitting the checks to Missouri for payment was essential to the consummation of the fraud upon the investors. The sales of securities were not complete until the investors' checks were paid by their banks and charged against their respective accounts, for, until paid, the investors could frustrate the scheme simply by stopping payment on their respective checks. Until the investors' respective bank accounts were charged with the checks, the investors did not

irrevocably part with their money and petitioner did not irrevocably receive the same. Thus the mails and interstate facilities were used in the sale of securities.*

Moreover, even if this were a mail fraud prosecution, the sending of the checks would be in execution of the scheme to defraud. This Court said in *United States* v. *Sampson*, 371 U.S. 75, 80:

> We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be "for the purpose of executing" the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circum-

* Petitioner's reliance upon *Carroll* v. *United States*, 326 F. 2d 72 (C.A. 9), and *Getchell* v. *United States*, 282 F. 2d 681 (C.A. 5), is misplaced. In *Carroll*, the court held that since the mailings in a Section 17(a) prosecution were not part of the offense under that Section but were simply required for jurisdictional purposes, the statute of limitations ran from the time that the defendants received the money through their fraudulent scheme and not from the time that the incidental banking transactions which followed took place. The case supports the decision below in holding "that while the mailing requirement is jurisdictional, it is not the essence of the offense [under Section 17(a) of the Securities Act] and may be merely incidental to it." 326 F. 2d at 86. In *Getchell* the court specifically stated it was not deciding a "question of statutory construction." It rested its decision on the language of the indictment, which indicated that defendants were *charged* with making misrepresentations in the letter that had been mailed. 282 F. 2d at 684.

stances provide the basis for an indictment under the mail fraud statutes.

On the facts here, even if one accepts the argument that permission to draw on the funds rendered the bank a holder in due course on each check, the mailings were in execution of the fraud. Petitioner would not have been allowed to draw on subsequent checks—indeed he probably would not have been able to continue in business at all—if the earlier checks did not clear. The scheme, in short, "was not limited to obtaining the purchase price from any particular purchaser. The scheme demanded continuity." *Cacy* v. *United States*, 298 F. 2d 227, 230 (C.A. 9).

This is not a case, like *Kann*, where the defendant had no interest in what occurred after he got his money on one particular scheme to defraud. Here the scheme had not reached fruition with the deposit of any particular check or checks; the consummation of later individual frauds and the scheme as a whole depended upon interstate transmittal of the checks to the drawee banks for payment.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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No. 248.

JAMES E. LITTLE,
Petitioner,
v.
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY

To Brief for the United States in Opposition to the Petition for a Writ of Certiorari.

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REPLY

To Brief for the United States in Opposition to the Petition for a Writ of Certiorari.

In resisting certiorari in the present case, the Government demonstrates it does not comprehend this Court's opinion in **Kann v. United States**, 323 U. S. 88 (1944). Petitioner submits that the principles of the **Kann** case require that petitioner's conviction be reversed.

1. Petitioner was convicted under Section 17 (a) of the Securities Act of 1933, entitled "Fraudulent Interstate Transactions." There are two elements to this offense—(1) did petitioner use interstate facilities (or the mails) either directly or indirectly, and if so, (2) was his use of

the mails in execution of a scheme to defraud or in the employment of a scheme to defraud?

Did petitioner directly or indirectly use the mails or interstate commerce? This Court said in the **Kann** case, *supra*, at page 93:

> "... while there may be some question as to whether the defendants may be said to have caused' the mailing of the checks, we think it a fair inference that these defendants who ... cashed the checks believed that the banks which took them would mail them to the banks on which they were drawn ..."

Thus it is clear that the petitioner "directly or indirectly" used the mails or "caused" the use of the mails when he deposited the checks in his bank knowing they would be mailed for clearance to the investors' banks.

But, was the use of the mails "in execution of his scheme to defraud"?[1] This Court decided this identical question in the **Kann** case. The Government argued there, as here, that the fraudulent scheme did not end with the cashing of the checks by the defendant but continued until the checks were cleared back through the drawees' banks. This Court rejected that argument and held the scheme was completely executed when the checks were cashed, and thus the subsequent mailing of the checks between the banks, **although caused by the defendants**, was not in execution of the scheme to defraud.

> "The scheme in each case had reached fruition. The persons intended to receive the money had re-

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[1] The quoted language is from the opinion of the court below: "... the crucial question presented by this Appeal is whether the clearance of the duped investors' checks through National and the Federal Reserve Bank in St. Louis, was either a 'direct or indirect use of the mail' by Appellant *in execution of his scheme to defraud*, as established by the evidence here." 331 F. 2d at 292 (emphasis added).

ceived it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires." **Kann v. United States,** *supra,* at 94.

In the **Kann** case, an element of the offense was missing—"that the mailing be for the purpose of **executing** the fraud." In our case, an element of the offense is missing—that the mailing be "in **execution** of his scheme to defraud."

2. The Government argues that even if the principles of the **Kann** case require a reversal of the conviction, such principles from a mail fraud case should not apply in this Securities Act case "where the gist of the offense is fraud in the sale of securities, and the use of the mails or interstate facilities is merely the factor which supports federal jurisdiction." Govt.'s Brief at page 8.[2] The court below discussed the "gist" of the offense:

> "In other words, it is our opinion that a scheme to defraud, in relation to a sale of securities, **and the use of the mails in consummation thereof,** is the gist of the crime denounced by the Congress in Section 17 (a) of the Securities Act of 1933, supra" (Emphasis added). 331 F. 2d at 292.

---

[2] The Government also attempts to distinguish between the statute involved in this case and the mail fraud statute by citing *United States v. Sheridan,* 329 U. S. 379 (1946). However, the distinction in the *Sheridan* case is one between the transportation in interstate commerce of forged checks (or stolen goods) and the transportation in inter-state commerce of fraudulently procured checks as in the *Kann* case and the present case. Thus the *Sheridan* case refutes rather than sustains the Government's contention that the statute in the *Kann* case is not analogous to the statute in the present case.

Thus, whatever the gist of the crime—whether broader, narrower or just the same as the mail fraud cases—the issue still is whether the mails were used in consummation of the scheme. This Court said in the **Kann** case, on facts identical to those involved here, that "it was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank," **Kann**, *supra*, at page 94. There is no valid reason for the court below to say the fraud was not consummated in the present case when this Court has said the fraud was consummated in the **Kann** case.[3]

3. The Government seeks to expand the federal criminal jurisdiction under the Securities Act beyond the meaning of the statute. Petitioner submits that a line must be drawn on this expansion and that the line in the **Kann** case—when the fraudulent scheme is complete—is a workable and sensible one. This Court in the **Kann** case said, with respect to mail frauds:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." **Kann v United States**, *supra*, at 95.

Petitioner submits that the Securities Act criminal section involved in this case does not, on its face, purport to reach

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[3] The Government's reliance on *United States v. Sampson*, 371 U. S. 75 (1962), is misplaced. In *Sampson* this Court merely reiterated the principle that subsequent mailings to the victims by the defendants if made for the purpose of "lulling" the victims may be part of the defendants' scheme to defraud. However, the mailing between the banks in this case was not for the purpose of "lulling" the investors and in fact this Court in the *Kann* case distinguished such mailings between banks from the lulling cases "where the use of the mails is a means of concealment so that further frauds which are a part of the scheme may be perpetrated." 323 U. S. at 94-95.

all fraudulent transactions, but only those fraudulent security transactions in which interstate facilities or the mails are used in employing the scheme to defraud.

CONCLUSION.

For the reasons set forth herein and in the Petition for a Writ of Certiorari, petitioner prays that the Petition for a Writ of Certiorari should be granted.

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